No. 67-132M

108 I.A. 2nd 26

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CITY OF BELLEVILLE, Plaintiff-Appellee, -vs- FRANK LEONARD, Defendant-Appellant.	)	Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois.
	)	Honorable Barney Johnston, Presiding.

George J. Moran, J.

This is an appeal from the Circuit Court of St. Clair County and its judgment finding a violation of the Belleville Zoning Ordinance prohibiting a mobile home or trailer on the defendant's property.

The parties have entered into the following stipulation:

"STIPULATION OF FACTS

On January 4, 1967, Norbert Wenzel, Building Commissioner of the City of Belleville, signed a Complaint against Frank Leonard, charging that he did on November 7, 1966, contrary to the provisions of the Belleville Zoning Ordinance, maintain and keep a certain house trailer or mobile home on certain premises located on North Church Street, in the City of Belleville, Illinois, which area is zoned A-2 Two Family Residence, and in which zone house trailers or mobile homes are prohibited.

The Belleville Zoning Ordinance went into effect December 21, 1965, providing, among other things, that no trailer or mobile home shall be allowed in an A-2 Two Family Residence District.

At the Hearing, without a jury, on May 11, 1967, before Magistrate Barney Johnston, the following evidence was adduced:

Defendant, Leonard, acquired a piece of property located adjacent to his home at 1521 North Church Street, Belleville, in December, 1963. The ground is approximately 75' x 162' and was improved at the time of the purchase with a five-room residence badly in need of repair and redecorating. The purchase price was $10,000.00 and Defendant stated it was "too high" for investment purposes, but that with a trailer or mobile home on the property, it was a reasonable investment, and with such intentions concerning the mobile home, purchased the premises. Before, and at the time of, the purchase, these intentions concerning the trailer were expressed to members of his family. The rental of the residence, after repairs and redecorations, is $100.00 per month. Defendant, Leonard, further testified that in addition to the rent from the residence, he is now receiving rental from the trailer, which he owns, of $100.00 per month.

In the spring of 1965, Leonard ran water lines and a sewer line, which had a certain type connection not used for a residence building, but peculiar to, and used for only mobile homes or trailers. These lines ran from the house to a portion of the lot where the trailer was to be placed. Defendant made certain improvements and changes in a car-port in the rear of the lot, put a slag fill and then gravel on top of a portion of the lot to serve as a drive-way for the carport. All the labor was done by Leonard, who has been a contractor in Belleville for many years, and one of his sons, who is also in the contracting business. Leonard stated he did not obtain a Building Permit for these improvements because he felt the amount involved did not require one. No charge or complaint was made by the City concerning a Building Permit. Certain used materials which Leonard had on hand were used by him in this project and he also purchased new materials for said improvements from certain building-supply firms; such purchases were less than $200.00. All of the work was completed in October or November, 1965.

Defendant Leonard testified that in January, 1966, he asked the Building Commissioner if he could put the trailer on his lot and was advised he could not do so and could get no such permit. On November 7, 1966 the Building Commissioner found that a trailer had been placed on the lot. After service of Notice to remove the trailer, and refusal by Leonard to do so, the present charge was filed. The Building Commissioner testified that the great majority of non-conforming uses in Belleville have not procured permits to continue such uses. Defendant did not procure a non-conforming use permit.

Lavern Leonard and Milton Leonard, sons of the Defendant, testified that prior to Defendant's purchasing the property, their father discussed his intentions of putting a trailer on it. A neighbor, Henry Von Bokel, testified that he observed the Leonards doing the work in the spring of 1965 and completing the work on the property during the fall of 1965, and that it was obvious to him as a layman, and in his opinion, it was apparent to the general public, that a trailer was going to be placed on the property.

No witness testified to rebut the testimony of the Defendant and his witnesses as to the purchase of the lot, the purchase price, Defendant's intention at the time he bought the lot, and that Defendant made repairs to the lot.

Norbert Wenzel, Building Commissioner, who is also the Zoning Enforcement Officer under the ordinance, testified that the Defendant never applied for a Building Permit when making the repairs; that in mid-summer of 1966, Defendant asked him if he could put a trailer on this lot, and he advised the Defendant he could not; that Defendant never requested a Non-Conforming Use Permit, and never obtained such a Permit; that in the latter part of October or November, 1966, he received several complaints from neighbors of the Defendant that a trailer had been placed on the lot, and that his investigation in November, 1966 revealed that a trailer was, in fact, there.

Orval Jung, a city employee in the Sanitation Department, testified that, as he had been a garbage collector for five years and was familiar with the property owned by the Defendant over this period of time, he had occasion to pass same several times per week; that he had occasion to observe the Defendant making the ground work and repairs on the property, but that he was not aware that a trailer was going to be moved to the lot until it actually was placed there, and that during the five years that he had covered this route, there had never been a trailer on the lot until the present trailer was placed there.

On May 23, 1967, Magistrate Barney Johnston, entered the following Order:

> 'The defendant Frank Leonard is found guilty as charged on this 22nd day of May, 1967. Beginning the 23rd day of May 1967 a fine of $50.00 a day will be assessed: - All fines will be suspended providing he removes the trailer from the premises by the 5th day of June, 1967.'"

Defendant contends that the uncontroverted facts disclose that the property in question was purchased for and connected to a legal, non-conforming use before the passage of the ordinance in question.

Section 9 of the Belleville Zoning Ordinance is entitled, "Non-Conforming Uses." This section authorizes the continuation of a non-conforming use which was such at the passage of the ordinance. Section 4, paragraph 78 of the same ordinance defines a non-conforming use as:

> "A building, structure or use of land existing at the time of enactment of this ordinance, and which does not conform to the regulations of the district or zone in which it is situated."

The Illinois Zoning Statute relating to non-conforming uses, states:

> "In all ordinances passed . . . due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire municipality and the uses to which the property is devoted at the time of the enactment of such an ordinance. The powers conferred by this Division 13 shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted ... ." Ill. Rev. Stat., Chap. 24, Sec. 11-13-1.

As a general rule, it is necessary, to entitle an owner to the protection of a lawful nonconforming use, that the property be in actual use as distinguished from a merely contemplated use, when the zoning restriction becomes effective. County of DuPage v. Stone Co., 18 Ill 2d 479, 165 NE2d 310. However, structures in the course of construction at the time of the enactment or effective date of a zoning law are generally exempted from the restrictions or prohibitions thereof. 58 Am.Jur., Zoning, Sec. 149, page 1022.

"A structure in the course of construction at the time of the enactment of the ordinance is protected as a nonconforming use, but mere preliminary work which is not of a substantial nature does not constitute a nonconforming use." 101 C.J.S., Zoning, Sec. 186, page 943.

In our opinion the facts of this case present a situation where the preliminary work is of a substantial nature. The uncontroverted evidence here reveals a purchase of land by defendant in 1963 with the expressed intent to place a trailer or mobile home on a part of it. Leonard and his family have invested many hours of their time running the water and sewer lines for the use of a trailer. Work has also been done on a carport and besides spending approximately $200.00 for new materials, Leonard has used old materials worth an undetermined amount already owned by him. The only thing which remained to be done was simply to move a trailer on the land and hook it up. This was delayed only because defendant was awaiting an opportunity to make a "good buy." We believe that this investment of time and money, along with the fact that much of this work is peculiar to use by trailers, has vested a substantial property right in Leonard. It is from a recognition of such rights that the law surrounding the continuation of nonconforming uses derives its merit.

City of Belleville on page five of its brief admits that substantial expenditures, work or changes of position relative to the erection of a building or establishment of a business, in addition to the purchase of land, may entitle one to protection against subsequent zoning, citing McQuillin Mun. Corp. (3rd Ed.), Section 25.188, and County of DuPage v. Stone Co., supra. It is this requirement of substantial overt acts which establishes when property is in actual use as distinguished from a merely contemplated use. With this understanding, we find the work completed by Leonard and his family at the time of the passage of the Zoning Ordinance to be of such a nature as to qualify it for protection as a nonconforming use.

The judgment of the trial court finding the defendant guilty of violating the City of Belleville Zoning Ordinance is reversed.

Judgment reversed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.

51262

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CURTIS HALEY, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE HERBERT R. FRIEDLUND Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Curtis Haley, hereafter referred to as the defendant, was indicted for murder, and after a trial before a jury was convicted of voluntary manslaughter. He was sentenced to five to twenty years in the penitentiary. In this court the defendant argues that:

1) He did not have a fair trial because he was subjected to a prejudicial cross-examination;

2) The State's final argument was improper;

3) The verdict of the jury was contrary to law and the evidence;

4) Prejudicial error was committed by the trial judge by remarks made by him to the jury which were calculated to hasten the jury's verdict; and

5) In the alternative, under the circumstances, the sentence imposed is excessive.

From the record it appears that the defendant was born in Louisiana where he lived until 1959 when he moved to Chicago. In Louisiana he had practically no education and was entirely illiterate; he could not read or write. After moving to Chicago the 44-year old defendant was steadily employed and owned the building in which he lived with his wife, his 9-year old son, and a stepson named DeWitt Bonie, who was 21 years of age. He rented the second floor of the building to Mrs. Coramae Long, a witness at the trial.

The defendant testified that on November 10, 1964, he arrived home at about 6:30 p.m. from his mechanic's job. His wife was intoxicated and unable to prepare dinner, so

the defendant went out and brought back food for his son, after which he put his wife and his son to bed. He then went out to his garage and worked until midnight, when he returned to the apartment and found that his wife had gone out. He found both his wife and his stepson, Bonie, in the apartment of Mrs. Long; Bonie was drinking beer and Mrs. Haley was sitting on the couch, apparently intoxicated. The defendant tried to talk his wife into going back to the apartment, and when she did not respond he pulled her to her feet, telling her to go downstairs. She sat down and the defendant slapped her on the face a couple of times. At this point Bonie grabbed the defendant and they fought for a few minutes until the defendant freed himself, and again directed his attention to his wife. Meanwhile, Bonie had gone into the kitchen and returned with a butcher knife which he used to stab the defendant in the back three times. Both Mrs. Haley and Mrs. Long tried to stop the attack, and in the attempt, Mrs. Haley was stabbed through the hand by Bonie.

The defendant managed to break free and started down to his apartment to get some money so he could go to a doctor. His wife went with him and Bonie followed them downstairs. Defendant was going to unlock the door, but before he could get his key, Bonie started slashing at him again with the knife. Mrs. Haley got between them and the defendant went out the front door of the building in order to avoid injury to his wife. Bonie followed him outside, and the defendant turned towards 16th Street, telling Bonie he was going to call the police, at which point Bonie ran around the building towards 18th Street. The defendant then went into his apartment, got some money, and took his shotgun with him. He went into the street intending to go to his car which was parked in the alley on 18th street, and to seek medical care for his wounds.

At the trial the defendant testified that he picked up the gun because "I were bleeding, and my arm was hurting, and I lost a lot of blood, and I was afraid he was going to kill me." He further testified that after picking up the money and the gun he went through the back door into a dimly lit alley, toward his car. He heard footsteps and when he looked back and saw someone coming, believing it to be Bonie, he said, "You better stop," and discharged the gun at the figure behind him. The person he shot was not Bonie, but Coulton Hayden, the defendant's cousin and his good friend, who died on the way to the hospital.

On November 11, 1964, at 3:05 a.m., the defendant was questioned by an assistant State's Attorney. His statement was transcribed and introduced in evidence by the State. At the time the defendant made the alleged statement to the State's Attorney he did not read it, and could not have read it, since he was illiterate. He was asked to initial the pages, which he did. There is no evidence in the record to indicate that the statement was read back to defendant.

In the statement defendant said he knew he had the right to an attorney but could not get one that night, so he would give the statement. He told of his wife's presence in the apartment of Mrs. Long and of his being cut by Bonie; that he then got his gun and went outside, stating "I was intending to shoot my stepson; because, after he cut me up, he tried to kill me. But I intended to shoot him, but I shot the wrong fellow."

Two police officers testified at the trial that they were sent to the area of the shooting, and when they arrived the deceased was already in the car and the defendant was at the wheel. The police served as an escort to the hospital. Officer Kunz testified that the defendant told him the shoot-

ing of his friend and cousin by marriage "was an accident and that he had no intention to shoot the deceased." Officer Kunz further testified that "the defendant said that he had no intention of shooting the deceased but he did say at some time that night that he did intend on shooting his stepson. . . . The defendant told me that when he was in the alleyway in the dark a person came up behind him and that he turned and shot this person thinking it was Dewitt, or something to that effect."

Officer Kunz further testified that the defendant said he was "seeking" his stepson the night of November 11, 1964. When he was cross-examined as to whether or not he was positive the defendant used the word "seeking" the officer said he was sure of it. He said the statement he had taken from the defendant was not verbatim; that he was testifying from the report he made at detective headquarters; and that he did not take down the exact words the defendant used.

Officer James testified that it would be fair to say that when he talked with the defendant he cooperated with him as a police officer.

DeWitt Bonie did not testify, and there is nothing to indicate why he was absent from the trial. Mrs. Haley [wife of the defendant] was in a hospital in Louisiana at the time of the trial and did not appear.

Although the indictment charged the defendant with murder, the jury returned a verdict of guilty of the offense of voluntary manslaughter. The provision in Ill. Rev. Stat. 1963, ch. 38, § 9-2 is as follows:

> Voluntary Manslaughter.] (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

(c) Penalty.
A person convicted of voluntary manslaughter shall be imprisoned in the penitentiary from one to 20 years.

Section 7-1 of the above statute provides:

Use of Force in Defense of Person.] A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.

The question presented to us in the instant case is whether under the facts the killing was "without lawful justification." Was the defendant's use of force—which was certainly likely to cause death or great bodily harm—reasonably employed, or did it constitute voluntary manslaughter as found by the jury? We bear in mind that the jury reached the conclusion that the defendant was guilty of the crime of voluntary manslaughter, and the rule is that such finding should not be disturbed unless unreasonable, improbable and unsatisfactory. People v. Turner, 82 Ill. App. 2d 10, 18-19. In People v. Coulson, 13 Ill. 2d 290, the Supreme Court said at page 296:

"A judgment of conviction can be sustained only on credible evidence which removes all reasonable doubt of the guilt of the defendant, and it is the insufficiency of the People's evidence which creates such doubt."

The judgment in that case was reversed on the ground that the evidence which had to be believed to sustain a convic-

tion was "improbable, unconvincing and completely unsatisfactory," and therefore the court did not hesitate to say [at 298] that the evidence "fails to establish the guilt of the defendants . . . beyond a reasonble doubt."

In People v. Brown, 78 Ill. App. 2d 327, 330, a conviction of voluntary manslaughter was reversed in part on the ground that the State failed to prove beyond a reasonable doubt that the defendant "did not believe the circumstances justified the killing and/or defendant's belief was reasonable, . . ." In Brown, the deceased was intoxicated at the time of the occurrence and had a bad reputation. He had struck defendant's mother on numerous occasions. Defendant said at the trial that he knew the deceased had something in his hand, and the "something" turned out to be a knife. There was evidence that the deceased was angry and that the defendant felt unable to escape from the apartment. Based on this set of circumstances the conviction was reversed, since "there was sufficient evidence in the record for defendant to believe that deadly force was necessary to prevent his death or to protect himself from great bodily harm and that this belief was reasonable."

In the instant case the only evidence the State introduced to support the indictment was (1) the statement allegedly made to Officer Kunz by the defendant; and (2) the alleged statement made by defendant to the State's Attorney. As has been pointed out, Officer Kunz testified from a report; the statements allegedly made to him by the defendant were not reduced to writing at the time they were made, but that the officer later went to his office and prepared a resume of the information he had received; that he had "summarized . . . all of the things that he remembered having taken place."

In the report of Officer Kunz he had mentioned that the defendant told him he was "seeking" his stepson. He was cross-examined with reference to that statement, but insisted he was positive that was what the defendant said. We find the use of the word "seeking" by an illiterate to be rather extraordinary.

The State also relies upon the statement allegedly made by the defendant to the State's Attorney. The defendant initialed each page of that statement and signed his name at the end. In the report he stated that he was not able to read or write and could only sign his name. In that statement the defendant allegedly said: "I was intending to shoot my stepson; because, after he cut me up, he tried to kill me. . . but I shot the wrong fellow."

In the statement the defendant also said, discussing the quarrel with his wife: "And so, . . . I decided I would pull her downstairs. And he [Bonie] went back in the kitchen and got a butcher knife and come back and start on me, two or three times in the back. So that's when I really got my gun. So I went around the building. So I went out back to cut him off. So when I was looking for him, my cousin stepped out from behind the building and I thought it was him." In considering this statement we cannot put aside the fact that the defendant is illiterate. We also cannot overlook the fact that he has difficulty in expressing himself with precision.

In the statement the defendant allegedly said that he went around the building to cut Bonie off. There is no indication that he did so. He stated that he believed Bonie had tried to kill him, and when he shot at the figure behind him he thought it was Bonie. Consequently, when he said he intended to shoot his stepson, he was saying only that when he pulled the trigger he believed he was shooting his stepson in self-defense.

On the stand the defendant was questioned as follows:

Q. When you went out to get your shotgun, you were looking for Dewitt, weren't you?

A. No. . .

Q. You took this shotgun along for your protection, is that right?

A. I was looking for him to attack me again.

Q. No. The question was: You took the shotgun along for your protection?

A. That's right.

Q. That is because you wanted to scare him, or if he wouldn't stay away from you, you were going to shoot him, is that right?

A. Because I were bleeding and I was scared he were going to kill me.

In order to sustain this conviction we would have to conclude that there is not a reasonable doubt that the defendant was justifiably in fear of his life and used such force as appeared reasonably necessary to abate the imminent peril. There is also no denial of defendant's statement that there had been a subsequent attack upon him by Bonie when he was attempting to open the door of the apartment; that this attack was really what first caused him to go out on the street.

Applying the rule laid down in People v. Coulson, supra, we can neither say that the evidence was credible or that it removes all reasonable doubt of the guilt of defendant. The jury returned a verdict of guilty of voluntary manslaughter, although the indictment charged the defendant with murder. This verdict was reached after the trial judge had called the jury out from its deliberations to inform the foreman that the jury had been deliberating for a long time, and inquired whether a verdict could be reached. It is possible that the jurors returned to their deliberations with a sense of compulsion to reach a verdict quickly and that the verdict

reached may have been a compromise between those holding out for a murder conviction and those who would have signed a verdict for acquittal. We will never know the precise reasons that prompted the verdict; and it is possible that the same verdict would have been reached if there had been no break in the deliberations. In a case as close as this we are inclined to view these minor interferences with closer scrutiny than those cases where the record is overburdened with proof of guilt. Whatever the reasons here for the verdict of guilty, we do not feel the evidence justified the verdict.

Because of our disposition of this case there is no necessity to consider the other errors asserted by the defendant. The judgment of the Circuit Court is reversed.

REVERSED.

LYONS, P.J., and BURKE, J., concur.

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52646

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. NELSON L. BONDS, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. JOSEPH M. WOSIK, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of armed robbery and was sentenced to a term of one year to five years in the penitentiary. He appeals, maintaining that he was not proven guilty beyond all reasonable doubt, and, more specifically, that the state failed to prove him guilty of the crime of armed robbery because the evidence failed to disclose the use of a weapon in the assault.

Mrs. Clara Thornton, the prosecuting witness, testified that at approximately 11:00 A.M. on September 21, 1966 she was walking along 60th Street between Eberhardt and Vernon Avenues in Chicago, across from Washington Park, when a girl whom she knew as "Pam" called to her from inside the park. Mrs. Thornton went into the park and approached the girl, who was in the company of two men. One of the men was the defendant, whom the witness had met previously and knew to be Pam's boyfriend, and the other man the witness did not know. The girl asked Mrs. Thornton for fifty cents, but she refused. Mrs. Thornton testified that as she turned to walk away, "something hit me upside the head and I fell." Defendant and the other man then began tearing at the clothing on the top portion of Mrs. Thornton's body and Mrs. Thornton stated she exclaimed, "I'm cut!"

The struggle lasted four to five minutes, during which time the defendant said to his companion, "Let's kill her, man, because she can identify me." When the struggle ended, Mrs. Thornton was missing $3.00 which she had previously secreted in her underclothing and 26 cents which was in her coat pocket. Mrs. Thornton also had a laceration on her left arm which later required five stitches to close

and which she said she did not have prior to the assault. The witness was unable to say which of the two men took her money, and further stated that she did not see a knife in the possession of either of the two men who robbed her.

Mrs. Thornton testified that after the robbery she went to her brother's apartment a short distance from the scene of the robbery where she had a conversation with her brother. She stated that she then went back into the street and hailed a police officer who took her to a nearby hospital where the laceration in her arm was stitched. The witness exhibited to the trial judge a one-inch scar which resulted from the laceration.

After returning from the hospital one or two hours after the robbery, Mrs. Thornton went back to the park where she again saw the defendant. Mrs. Thornton hailed two police officers in a squadrol and related her story to them. The officers then stopped the defendant for questioning. On cross-examination Mrs. Thornton stated that upon her return to the park after her visit to the hospital she saw defendant walking in the park with Pam and that when he and Pam saw the witness in the police vehicle, the defendant "turned and started to run away, the officer jumped out and arrested him, and she [Pam] disappeared."

Chicago Police Officer John Mannion testified that at approximately 1:40 P.M. on the date in question he and his partner met Mrs. Thornton near Washington Park, and she took them to the park area. Defendant was inside the park with several other persons, near a picnic table, and when he observed the police vehicle, he and another man began walking away from the vehicle. Defendant and the other man were summoned by the police officers to the vehicle, a conversation was had between the officers, Mrs. Thornton and the defendant, and the defendant was placed under arrest.

Defendant testified in his own behalf and stated that he had known Mrs. Thornton prior to September 21, 1966, and that on that

date he saw her in Washington Park between 8:00 and 9:00 in the morning. Defendant at that time was talking to another man, whom he had met for the first time the day before, and observed Mrs. Thornton some fifty yards away. Defendant testified that the man with whom he had been conversing subsequently knocked Mrs. Thornton to the ground, took something from her, and walked away. Defendant stated he left the park after the assault by the other man and returned later in the day to play cards. He testified that he was arrested for the robbery of Mrs. Thornton approximately 6:00 P.M. that same day. Defendant denied knowing the girl named "Pam" and also denied taking money from Mrs. Thornton.

Defendant's claim that he was not proven guilty beyond all reasonable doubt is unavailing. The complaining witness' testimony is clear that she was attacked by two men, who knocked her to the ground and began tearing at the top portion of her clothing. One of these men she identified as defendant, stating that she had met him previously through her girlfriend, Pam. Mrs. Thornton testified that it was the defendant who stated to the other assailant that they should kill her because she was able to identify him. After the assault, Mrs. Thornton testified, she was missing $3.26 which she previously had on her person. Defendant admitted that he was in the park and at the scene when Mrs. Thornton was robbed. His testimony showed that she was knocked to the ground by the man with whom he had been previously conversing and that something had been taken from her person. It was defendant's story, however, that only the man with whom he had been conversing was involved in the robbery and that he, defendant, merely observed the occurrence, after which he walked away.

Defendant points to the testimony of Mrs. Thornton, that defendant attempted to "run away" when she returned to the scene in the

squadrol with the police officers, as conflicting with the testimony of Officer Mannion that the defendant did not attempt to run away when the police vehicle approached. However, Officer Mannion testified that defendant, after initially observing the police vehicle, began walking into the park, away from the vehicle, and stopped only when the officers called out to him. Defendant also states that Mrs. Thornton's testimony that defendant stated he intended to kill her is questionable in light of all the circumstances surrounding the alleged robbery.

Matters of conflict in the testimony and questions of credibility of the witnesses, such as are alluded to by the defendant in this regard, are for determination by the trier of fact, and unless the evidence presented is so improbable, unbelievable or unsatisfactory as to raise a serious question as to the guilt of the accused, such determination by the trier of fact will not be disturbed where, as here, there is ample evidence, if believed, to support the judgment. People v. Jackson, 28 Ill. 2d 37; People v. Jennings, 84 Ill. App. 2d 33. The cases relied upon by defendant in support of this position are distinguishable from the case at bar on their facts: see People v. Coulson, 13 Ill. 2d 290; People v. Dawson, 22 Ill. 2d 260; and People v. Magnafichi, 9 Ill. 2d 169.

Defendant also maintains that the state's evidence failed to disclose the use or existence of any weapon in connection with the robbery; he argues that, consequently, the state failed to prove him guilty of the crime of armed robbery. We disagree.

Mrs. Thornton testified that, as she turned to walk away from defendant and his companions, "something" hit her in the head and she fell to the ground. While defendant and the other man began tearing at the clothing on the upper part of her body, Mrs. Thornton exclaimed, "I'm cut!" [Mrs. Thornton testified that prior to her encounter with the defendant and his companion she was neither

cut nor bleeding.] During the attack, defendant stated to his companion that they should kill Mrs. Thornton because she was able to identify him. The laceration inflicted to her left arm, the general area of her body where the defendant and his companion tore at her clothing, which Mrs. Thornton received during the robbery required five stitches to close; the one-inch scar which resulted from that laceration was exhibited to the trial judge ten months after the wound was inflicted. A wound requiring five stitches to close and leaving a one-inch scar was caused by something more than a fingernail. The existence of a weapon may be inferred from circumstantial evidence. People v. Harrison, 359 Ill. 295; see also People v. Liner, 168 Cal. App. 2d 411, 335 P. 2d 964; State v. Rowland, 263 N.C. 353, 139 S.E. 2d 661; People v. Wood, 192 Cal. App. 2d 393, 13 Cal. Rptr. 339. The trial judge properly found defendant guilty of armed robbery.

The case of People v. Binion, 80 Ill. App. 2d 130, cited by defendant is not in point. In Binion there was absolutely no evidence of the use or existence of a weapon during the robbery; the evidence showed only that the victim was attacked, severely beaten and lost consciousness; when he awoke his wallet, money and an article of wearing apparel were gone and his pants were torn. Here, there is sufficient evidence from which the trier of fact could reasonably infer that the defendant and/or his companion employed a weapon of some sort in robbing Mrs. Thornton.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

52816

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. HERRON LOVE, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. JACQUES F. HEILINGOETTER, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of murder and was sentenced to a term of fourteen years to twenty years in the penitentiary. On this appeal he maintains that the trial court erroneously interpreted the law of Illinois with respect to the degree of provocation necessary to reduce a homicide from murder to manslaughter; he states that the cause should be remanded for a new trial or, alternatively, that the finding and judgment should be reduced to voluntary manslaughter and the sentence reduced accordingly.

The evidence reveals that the deceased, Eddie Bovan (also known as Sam Bovan,) owned an apartment building on South Indiana Avenue in Chicago and occupied the first floor of the building. Defendant Herron Love occupied a room on the second floor of the building which he shared with his girlfriend, Lavergne Futrell. A living room on the second floor of the building was used by the tenants as a sitting room where they would occasionally drink and gamble together.

Lorraine Bovan Walker testified that she was a daughter of the deceased and was with the deceased in his apartment on the late morning and early afternoon of December 23, 1966. She stated that her father went to the second floor of the building at approximately 12:50 P.M. on that date to speak with Miss Futrell with respect to Mrs. Walker's children. (Mrs. Walker testified that her father went to the second floor earlier that day, sometime prior to noon.) Shortly after the deceased went upstairs the second time, Mrs. Walker testified she heard gunshots. Defendant

and another tenant of the building, John Adams, then came downstairs and told Mrs. Walker that defendant had just shot her father. Mrs. Walker also testified that she did not know whether her father or any of the other persons present on the second floor had been drinking that day, and she also could not say whether her father had been gambling.

Lavergne Futrell testified that she, the deceased, the defendant, John Adams and Mack Brisco were in the second floor sitting room at approximately 1:30 P.M. on the day in question. The deceased had been in the room earlier that day, and when he returned with a bottle of liquor, he, Adams and Brisco began to drink and shoot dice. Although defendant did not enter the dice game, he did drink with the other men. Miss Futrell testified that while the game was in progress, the deceased accused the defendant of taking the deceased's money, which defendant denied. Defendant stated to the deceased, "I am tired of you pushing me around," and "Sam, I don't want to hurt you, Sam." Miss Futrell testified that she stated to the deceased that the defendant did not have the deceased's money and that the deceased then began calling the witness vile names and stating that he would throw both the witness and the defendant out the window. Defendant then said to the deceased, "I'm tired of you pushing me around and pushing her around also." Miss Futrell testified that "everything got quiet" and defendant left the room. Defendant returned with a gun and told the deceased that he did not want to hurt him. Defendant then fired three shots, killing the deceased.

On cross-examination Miss Futrell testified that the deceased "was drinking and when he gets like that, he just goes all to pieces." She stated that after defendant returned to the sitting room with the gun, the argument began anew and the deceased was shot. Miss Futrell also testified that defendant had a reputation in the community of becoming violent when he drinks liquor.

John Adams testified that he, the defendant and the deceased

had been drinking on the day in question but that there had been no gambling. He stated that he did not know whether the deceased and the defendant had an argument because he had left the room. The witness testified that he heard defendant say, "I'll shoot you, Sam," followed by a gunshot. He then went downstairs to get Mrs. Walker.

Mack Brisco testified that he was present in the sitting room and witnessed the shooting. The men had been drinking from a bottle of liquor belonging to the deceased and a discussion arose as to who was to get the next drink. An argument arose between defendant, the deceased and Miss Futrell. Defendant threatened to kill the deceased and told him to wait until the defendant got back. Defendant left the room and returned with a gun. He again threatened the deceased, but the deceased said nothing. The witness testified that after another threat was made by the defendant, the deceased took a drink from the bottle and the defendant began shooting at him.

Defendant testified in his own behalf and stated that on the day in question he, the deceased, Adams and Brisco were drinking liquor in the sitting room of deceased's building, and that the other three men were engaged in a game of dice. After a short period of time had elapsed the deceased told Miss Futrell that he did not like her because she did not like children, and Miss Futrell told the deceased that she did not want to speak to him because of the language he had been using toward her. At this time the defendant got his gun and put it into his pocket. The deceased then threatened to throw Miss Futrell and the defendant out the window, to which defendant replied that the deceased was not going to do anything to either of them. Defendant testified that the deceased continued to argue and the defendant told the deceased that he did not want to harm him. He thereafter shot and killed the deceased. The defendant also testified that the deceased became violent when

he was drinking.

Defendant contends that a "quarrel," as distinguished from "mere words," is sufficient to reduce a homicide from murder to manslaughter. He argues that the rule in Illinois, that mere words alone are not sufficient provocation to reduce a homicide from murder to manslaughter, was modified by this court in People v. Stepheny, 76 Ill. App. 2d 131. We are of the opinion that the trial court correctly found the defendant guilty of murder under the circumstances of this case.

The defendant in the Stepheny case was found guilty of manslaughter although the indictment charged him with the greater crime of murder. On appeal the reviewing court concluded that the defendant was properly found guilty of manslaughter after a review of the record showed that the magnitude of the quarrel between the defendant and the deceased constituted such provocation as was necessary to reduce a homicide from murder to manslaughter.

It does not follow from the holding in the Stepheny case that any quarrel between an accused and his victim will constitute such provocation as is necessary to reduce a homicide from murder to manslaughter. The issue is one for determination by the trier of fact. People v. Slaughter, 29 Ill. 2d 384, 391; see also People v. Thomas, 93 Ill. App. 2d 77, 80. Here the trial court concluded that the quarrel between the defendant and the deceased was not of sufficient magnitude to justify a finding of voluntary manslaughter. As can be seen from the foregoing detailed facts, the record contains no evidence of such provocation on the part of the deceased which could have reduced the homicide in question from murder to manslaughter.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and MC CORMICK, J., concur.

NO. 68-64

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. GEORGE WILLIAM SMITH, JR., Defendant-Appellant.	)	Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Lake County, Illinois

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

A jury in the Circuit Court of Lake County found George William Smith, Jr. guilty of armed robbery. The trial court, based on the jury's verdict, sentenced defendant to not less than 15 nor more than 20 years in the Illinois State Penitentiary. The trial took place during the month of June, 1967. From this judgment the defendant appeals.

Defendant assigns five grounds for reversal. First, defendant urges that he was deprived of his right to counsel by not having counsel present at the preliminary hearing. Secondly, defendant assigns as error his failure to have an attorney present when he was identified at the police station. Thirdly, defendant asserts that the attorney appointed for him by the court, who defended him before the jury, was incompetent. Defendant's fourth contention is that the State's Attorney's closing argument contained improper and prejudicial statements. His final contention is that the sentence imposed upon defendant was too severe and should be reduced, should this court find that his conviction was proper.

The facts as they appear from the record are as follows: George William Smith, Jr., one Cyril Gargano and one James Grecias allegedly made plans on the morning of January 20, 1967, to rob the Frolic Lounge at Frolic and Washington Streets in Waukegan, Illinois. At approximately 2:15 P.M. the three approached the tavern in an automobile. Defendant Smith and Grecias entered the tavern at approximately 2:20 P.M. Mike Murphy, the owner of the Frolic Lounge, and James McCrory, his part-time bartender, observed them. Murphy later testified that he recognized Smith and was about to greet him when he saw that both men entering the tavern had guns pointed at him and his bartender. Smith and his companion advised that they were there for the purpose of burglary and told Murphy and McCrory to go into the washroom, which they did. Murphy testified that during the next few minutes he could hear sounds from the barroom and, after silence had set in, left the washroom and found they had been robbed of approximately $2,001 in cash and a bottle of Seagram's V.O. liquor. The three alleged thieves then went to 721 Bluff Street in Waukegan where later Grecias was arrested and found to have $797 in currency and $159.63 in rolled coins in a cigar box, plus the bottle of Seagram's V.O. There were several other identifying items connecting them with the Frolic Lounge. Smith had gone to his mother's residence at 223 Lincoln Street in Waukegan where he was later found with a brown suitcase containing an amount of money and $1,700 hidden under a quilt in the bedroom.

George William Smith, Jr. was brought before a magistrate for the purpose of preliminary hearing, pursuant to Art. 109 of the Code of Criminal Procedure (ch. 38, sec. 109-1, Ill. Rev. Stat.)

Defendant first urges that he was denied his right to

counsel at the preliminary hearing. This hearing complied with Art. 109 of the Code of Criminal Procedure, supra. It was held at a location where this type of proceeding was not normally conducted and apparently in consequence no court reporter was present. On the jacket of the record appears a written statement in part as follows:

> ". . . . in open court in person and in custody, informed of rights. Preliminary hearing held. Probable cause shown. . . . . "

When viewed in the light of The People v. Bonner, 37 Ill. 2d 553 (May 1967) where the court said at page 561:

> "Having determined that no decision binding on us subsequent to Morris has extended the right to counsel to stages in the judicial process which may not properly be characterized as "critical" and that no statutory right to counsel exists at a preliminary hearing, we hereby reaffirm our holding in Morris that a preliminary hearing is not a critical stage in the judicial process where the accused is entitled to counsel. Having also determined that the applicability of this holding is not affected by whether the accused requests counsel or not, and since the defendant does not allege, nor the record disclose, that any actual prejudice occurred at his trial as a result of his lack of counsel at his preliminary hearing, we hold that the denial of counsel in this instance did not violate any applicable constitutional rights of defendant." (The citation to the Morris case is: The People v. Morris, 30 Ill. 2d 406).

we conclude that the defendant was not entitled to counsel at the preliminary hearing.

The second contention that is assigned as error is the failure to have an attorney present when defendant was identified at the police station. On January 30, 1967, defendant was indicted for an offense committed January 20, 1967. The lineup occurred in the Waukegan Police Station January 20, 1967. On May 10, 1967, the verdict was returned by the jury. In Gilbert v. State of California, 388 U.S. 263, 272, 78 S. Ct. 1951, 18 L. ed. 2d 1178 (6/12/67),

and in U.S. v. Wade, 388 U.S. 219, 237, 87 S. Ct. 1926, 18 L. ed. 2d 1149 (6/12/67), the Supreme Court held that a lineup was a critical stage of a criminal proceeding and that it was error not to have informed defendants and defendants' attorneys in both of these cases of the proposed lineup and, therefore, their lineup identification could not be testified to by an in-court investigation by those individuals who had identified the defendants at that lineup. On the same day that the Supreme Court rendered these decisions in these two cases, it delivered a decision in Stovall v. Denno, 388 U.S. 293, 300, 87 S. Ct. 1967, 18 L. ed. 2d 1199. In that case the Supreme Court held that the decisions in Wade and Gilbert (supra) should not apply retroactively. The identification that took place in the case before us occurred prior to those decisions. We therefore reject defendant's contention that he is entitled to reversal because his constitutional rights were violated by failure to have counsel at the time he was identified.

Prior to trial the court appointed a Public Defender to represent George William Smith, Jr. The contention on this appeal is that the Public Defender did not afford defendant an adequate defense in that he failed to properly cross-examine the witnesses against defendant. We have read the testimony in the record before us and have come to the same conclusion as the Supreme Court in The People v. Clay, 32 Ill. 2d 608, 612, that:

> ". . . In light of the overwhelming evidence against the defendant,it is difficult to see how anything counsel could have done would have produced a different result. . . ."

In our opinion trial counsel for the defendant did a competent and adequate job in presenting what little defense this defendant had to offer. The elements necessary to establish the inadequacy of re-

presentation by counsel so as to require a new trial have been set forth by our Supreme Court, in The People v. Georgev, 38 Ill. 2d 165, 169. In applying those tests to the record before us, it is our opinion that trial counsel did a competent and adequate job of presenting what little defense this defendant had to offer and that defendant is not entitled to a new trial for that reason.

The next contention is that the State's Attorney in his closing argument and during the course of the trial made remarks which were improper and prejudicial. It appears that the State's Attorney kept insinuating that George William Smith, Jr. was a thief, based upon his prior convictions in the State of Michigan and upon the uncontrovertible evidence in the instant case. Arguments of counsel based upon facts and circumstances proved, or legitimate inferences that may be drawn therefrom, do not exceed the bounds of proper debate. It is not improper for the prosecuting attorney to reflect unfavorably on the defendant, or to comment on his actions, if based on competent and pertinent evidence. The State's Attorney has the right to dwell on the evil results of crime and to urge fearless administration of the law. We are of the opinion that the closing arguments of the State's Attorney in the case before us are not such as to have deprived defendant of a fair trial. The People v. Burnett, 27 Ill. 2d 510, 516; The People v. Lopez, 10 Ill. 2d 237, 241.

Defendant finally argues that this court should reduce the sentence as being too severe and, in support of that, points out that he has not been in any serious trouble in the State of Illinois recently. The record shows at the time of trial he was 36 years old. He had been placed on probation in the State of Illinois in April of 1946 for a period

of one year for a charge involving auto larceny. In May of 1947 he was sentenced to 60 days in the Illinois State Farm on a charge of tampering with a motor vehicle. Defendant then attempted to enlist in the armed forces but was discharged for fraudulent enlistment. In March of 1952 he was placed on probation for five years on a charge of burglary, larceny of a motor vehicle and armed robbery. In August of 1953 he was committed to the Joliet Penitentiary for a period of one to four years for violation of probation. He served three years and two months of this sentence. In June of 1960 he was arrested in Michigan and committed to the State Prison at Jackson for three to five years on a charge of breaking and entering in the daytime. He was paroled in May of 1962. In September of 1962 he served ten days in the County Jail on a charge of assault and battery. In 1963 he was returned to Jackson, Michigan, for violation of parole and released in 1964. Defendant now argues that the sentence should be reduced because it has been a considerable period of time since he violated the law in the State of Illinois, prior to this conviction. It appears that defendant has spent so much time in the penitentiary in Michigan he hasn't had a chance to get into any serious trouble in the State of Illinois until the instant case. The sentence in this case is well within the punishment fixed by the statute and we find nothing in the record to indicate that the trial court abused its discretion in so fixing the sentence. A sentence will not be disturbed unless it clearly appears that the penalty is a substantial departure from the fundamental law and not proportioned to the nature of the offense. The People v. Miller, 33 Ill. 2d 439, 444, 445; People v. Davidovic, 68 Ill. App. 2d 216, 220. In our opinion the sentence of the trial court was reasonable and justified under the circumstances.

For the reasons above expressed, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

MORAN, P. J. and DAVIS, J. concur.

103 I.A. 2nd 250

No. 68 159

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

BROADWAY ELECTRIC CO., INC., an Illinois corporation, Plaintiff-Appellee, v. WM. ZEIGLER & SON, INC., an Illinois corporation, Defendant-Appellant.	Appeal from the Circuit Court of the 16th Judicial Circuit, DeKalb County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINON OF THE COURT.

The defendant, Wm. A. Zeigler & Son, Inc., was the prime mechanical contractor in the construction of a dormitory at Northern Illinois University and the plaintiff, Broadway Electric Co., Inc., was the prime electrical contractor. As part of its contract with the University, Zeigler was to complete certain electrical work. On March 4, 1964, Zeigler wrote to Broadway and requested quotations for the costs to sub-contract some of this work to them. On March 9, Broadway responded to Zeigler's request and asked for a list of the motors and equipment involved so that it could accurately estimate the cost. On April 1, Zeigler mailed a list of equipment that included refrigerator compressors for the dormitory building in question. On May 2, Broadway quoted the price of $1,764.00 to do the work but further stated "This quote does not include interlocking or control wiring of these units . . .".

On May 15, Zeigler accepted the quote and Broadway performed the work with the exception of the wiring of eight defrost heating units in the dormitory and was paid the $1,764.00.

In October of 1965, Marvin Maurer, the architect on the job site and an agent for the University, requested Broadway to "wire up the damn defrost units." Broadway did wire the units as requested and sent a bill to Zeigler for $3,128.02 which was never paid. Broadway brought suit against the University, the architect and Zeigler.

We are at a loss to determine why this case is before us. It is agreed by all parties that Zeigler had the obligation to wire the defrost units in its contract with the University and that the University has the obligation to pay them for that service. It is also undisputed that Broadway performed the service to the satisfaction of all concerned. Although Zeigler maintains that Broadway was obliged to wire the units on the basis of their agreement of May 1964, the letter of Broadway of May 2 clearly excluded all "control wiring" and Zeigler admits that if it received the $3,128.02 it would have to pay it to Broadway. The University has, in effect, interpleaded in the cause and indicates it has the $3,128.02 and is willing to pay it upon the receipt of satisfactory waivers of lien.

The trial court entered judgment against Zeigler and in favor of Broadway in the amount of $3,128.02 on its complaint for "additional work" performed by it on its original contract with Zeigler. It is clear from the evidence that the express contract between Broadway and Zeigler did not include the wiring of the de-

frost units.

It is also, as we have said, undisputed that Zeigler had the obligation to wire the units under the provision of its contract with the University and was entitled to reimbursement for the costs thus incurred. The evidence discloses further that Zeigler was aware that the architect requested Broadway to complete the wiring and that the work was satisfactorily completed by it. At this point, Zeigler is entitled to the $3,128.02 from the University, and will receive it upon the tender of its waiver of lien, for work done on its behalf and with its' knowledge by Broadway.

A similar situation existed in the case of Beatrice Foods Co. v. Gallagher, 47 Ill. App. 2d 9 (1964). There Gallagher had a contract with the State of Illinois to furnish dairy products to the Kankakee State Hospital for a period of months including the month of March, 1959. With Gallagher's knowledge, Beatrice Foods in fact processed the products, placed them in packages stamped with Gallagher's name, and delivered them to the hospital, all at no expense to him. The State paid Gallagher $12,262.77 for the products and when he refused to turn the money over to Beatrice suit was filed. Gallagher urged that the complaint did not state a cause of action since he had no contractual relation with Beatrice and hence no obligation to pay them anything.

The court concluded that the complaint did state a cause of action either under the theory of implied contract or quasi contract and defined a quasi contract as one that arises not from any agreement of the parties but from principles of "natural" equity and good con-

103 I.A. 2nd 334-1

No. 68 156 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

BLANCHE CELING, PLAINTIFF, Counter Defendant Appellant, v. NORMA L. MELLER, Defendant, Counter Plaintiff Appellee.	)	Appeal from the Nineteenth Judicial Circuit, Lake County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, Blanche Celing, for personal injuries and property damage allegedly suffered by her as a result of an automobile accident caused by the negligence of the defendant. The defendant filed a counter-claim for damage to her automobile. The jury returned a verdict for the defendant on the plaintiff's complaint and for the plaintiff on defendant's counter-claim. The trial court entered judgment on the verdicts and the plaintiff appealed. No appeal was taken from the judgment in favor of the plaintiff on the counter-claim.

The plaintiff testified that at approximately 8:00 A. M. on November 23, 1964, she was driving in a westerly direction on Waverly Avenue in the City of Barrington. The weather was sunny and bright and the road was dry. As she approached the intersection of Waverly and Exmoor Avenue she was traveling approximately 24 miles per hour. When she was about one car length from the intersection she observed the defendant's

car about four car lengths north of the intersection on Exmoor and heading south at approximately 25-30 miles per hour. Plaintiff proceeded and was struck by the defendant in the northwest quadrant of the intersection. Her automobile, a station wagon, was hit on the right side from the front of the rear door to the rear bumper.

On cross examination, the plaintiff testified that she "eased up" when she was about three car lengths from the intersection because "there are trees and shrubs there and you'd be foolish to be flowing through an intersection." She looked to the right when she was about one car length from the intersection and saw the defendant. The plaintiff then stated:

> "After I saw her car--well, I don't know how you would say it -- I decided that I was well ahead of her and would have no problem going through the intersection if she was farther back than I was, and I decided that I had the right of way because I was there ahead of her and then I put my foot back on the gas like I'd been driving before."

The defendant testified that she lived one block north of the intersection on Exmoor Avenue and was very familiar with the area. She was driving her son, Lee Meller, to high school and was proceeding south on Exmoor at approximately 20 to 25 miles per hour. When she was 15 feet north of the intersection, she looked to her left and saw a tree but no automobile. The defendant testified that she first observed the plaintiff's automobile when it was directly in front of her a moment before the impact and that she had no time to sound her horn, apply her brakes or even remove her foot from the gas pedal. She estimated that the plaintiff was driving 25 to 30 miles per hour at the time of the accident.

Lee Meller testified that he sat next to his mother in the front seat but was "paging through" his school books. He looked up a moment

before the collision and saw the plaintiff directly before them. He estimated the plaintiff's speed at 30 to 35 miles per hour.

Both Exmoor and Waverly Avenues are about 20 feet wide at this point. The intersection has no traffic controls and the roads have no curbs or median lines. Photographic exhibits introduced by both parties indicate that the lots adjoining the intersection have considerable shrubbery including evergreens.

At the conclusion of the evidence, the plaintiff moved that the trial court direct a verdict against the defendant on the question of liability. That motion was denied and the court further refused to instruct the jury that the defendant was guilty of negligence on the complaint of the plaintiff or contributorily negligent on her counterclaim as a matter of law as requested by the plaintiff.

On appeal, the plaintiff contends that the trial court was in error in its refusal to either direct a verdict on the issue of liability or instruct the jury that the defendant was negligent as a matter of law and as a result of the jury's improper consideration of those issues it rendered a verdict that was a "washout" and against the manifest weight of the evidence.

Until the case of Pedrick v. Peoria & Eastern R. R. Co., 37 Ill. 2d 494, different standards were employed in the determination of when negligence or contributory negligence become questions of law and when a verdict on those issues should be directed. Happily, that case resolved the confusion and it was stated at p. 503:

> "Logic demands that one rule governs both the direction of verdicts and determination of the presence or absence of negligence or contributory negligence as a matter of law, for in both situations the issue is whether a court or the jury should decide the negligence issue."

After a review of all other jurisdictions, the court concluded at p. 510

that the common standard to be employed in the future would be as follows:

> "In our judgment verdicts ought to be directed and judgments n. o. v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdic t based on that evidence could ever stand."

If we apply that standard to our case we would view the evidence as follows: The defendant was driving at approximately 20 to 25 miles per hour in a southerly direction on Exmoor Avenue. As she approached the intersection, she turned her head in both directions to observe traffic on Waverly. She saw no cars in sight and proceeded into the intersection.

Plaintiff relies primarily on the photographs in her argument that the defendant truly looked to her left she could not have failed to observe the plaintiff and cites law to the effect that a person cannot "be absolved of the charge of negligence in failing to look by testimony he looked and did not see...." Pantlen v. Gottschalk, 21 Ill. App. 2d 163, 170. However, in addition to the direct testimony of the defendant that she had did look and saw only the trees, the plaintiff herself testified that she was unable to observe traffic on Exmoor until she was one car length from the intersection because "..... there's trees there, pine trees. . . ." Although the photographs do add weight to the plaintiff's argument, we do not feel that the evidence "so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." Pedrick v. Peoria & Eastern R. R. Co., supra; Gary v. Rogers, 104 Ill. App. 2d 154, 158, 159. The motion for a directed verdict and instructions on negligence as a matter of law were therefore properly denied by the trial court.

We must next consider whether the jury returned a verdict that was against the manifest weight of the evidence. Other than the slight

variations in the estimated speeds of the respective vehicles, there was only one serious dispute in the evidence. Lee Meller and his father, who arrived at the scene a few minutes after the accident, both testified that the plaintiff stated that she thought she could "beat" the defendant through the intersection. The plaintiff denied making any such statement.

There were no other witnesses to the accident. It was, therefore, not necessary for the jury to wade through a mass of conflicting testimony to reach a determination if, under the circumstances, either, or both, of the women were guilty of negligence. We note that the jury was advised as to the law relative to the right-of-way for vehicles approaching or entering intersections (Ill. Rev. Stat., 1963, ch. 95 1/2 sec. 165) by plaintiff's instruction No. 6 as follows:

> "At the time of the occurrence in question, there was in force in the State of Illinois a statute governing the operation of motor vehicles approaching intersections.
>
> If two vehicles are approaching an intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the right will enter the intersection first or both vehicles will enter the intersection at about the same time, then this statute requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.
>
> On the other hand, if two vehicles are approaching the intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the left will enter the intersection and pass beyond the line of travel of the vehicle on the right before the vehicle on the right enters the intersection, then this statute requires the driver of the vehicle on the right to yield the right of way to the vehicle on the left.
>
> The fact that a vehicle has the right of way does not relieve its driver from the duty to exercise ordinary care in approaching, entering and driving through the intersection."

This instruction is from the Illinois Pattern Jury Instructions

(No. 70.02) and correctly states the law in effect at the time of the accident. Aided with that instruction, the jury apparently decided that both women were negligent. It is not within our power to reverse that decision unless it was against the manifest weight of the evidence. Lau v. West Towns Bus Co., 16 Ill. 2d 442, 451. Under the circumstances, we cannot say that it was. The judgment of the trial court should therefore be affirmed.

JUDGMENT AFFIRMED.

DAVIS and SEIDENFELD, JJ., concur.

108 I.A. 2nd 334 2

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10968 Agenda No. 69-14

People of the State of Illinois,

Plaintiff-Appellee,

vs.

Jeroid Barbour, Sr. a/k/a "Pee Wee" Barbour, Impleaded,

Defendant-Appellant.

Appeal from Circuit Court Sangamon County

CRAVEN, J., delivered the opinion of the court.

The defendant was found guilty in a jury trial of the offense of aggravated battery and resisting a police officer, while armed. He was sentenced to a term of not less than one year nor more than ten years in the Illinois State Penitentiary. He appeals.

The defendant contends the trial court erred when it failed to direct a verdict at the close of the People's evidence. Further, the defendant seeks to have this court review the action of the trial court in making one Shirley Ann Davis the court's witness during the trial.

On January 22, 1967, at about 12:30 a.m., the defendant, his wife Ada and son Jeroid, Jr., and Jeroid's girl friend,

Shirley Ann Davis, were seated at a table in a tavern in Springfield. An argument developed between the defendant and his wife. Officer Frederick A. Hill, of the Springfield Police Department, then off duty and out of uniform, was also in the tavern sitting at the bar. Defendant and his wife got up from the table, obtained their coats and prepared to leave. The argument continued. The evidence indicates that the defendant pulled his wife into an aisle, shoved her, and finally shoved her up against a door just inside the tavern. He then pulled her back from the door, opened the door, and pushed her out and up against an outside wall of the tavern. Officer Hill got up and followed the defendant and his wife outside.

The evidence as to the subsequent events is in conflict. The State contends, and Hill testified, that Hill told the defendant he was under arrest. The defendant resisted and an ensuing fight or scuffle followed during which Hill was cut with a straight razor wielded by the defendant. Defendant and his wife asserted a different view. They testified that an "unknown" person attacked the defendant from behind, knocked him to the ground, pulled his coat over his head, and that the injury to Hill resulted when the defendant was resisting this attack. The evidence indicates that Hill knew the defendant and that the defendant knew Hill, and further knew him to be a police officer.

The thrust of defendant's argument is that he was resisting an invalid or illegal arrest and in so doing was

entitled to use the razor "defending himself from attack." He concludes that the trial court should have directed a verdict of not guilty in that there was no evidence of an offence. We do not agree.

Section 107-2 of ch. 38, Ill.Rev.Stat.1967, provides that:

> "A peace officer may arrest a person when: . . .
>
> (c) He has reasonable grounds to believe that the person is committing or has committed an offense."

The word "offense", as used in this statute, includes misdemeanors as well as felonies. People v. Clark, 9 Ill. 2d 400, 137 N.E.2d 820 (1956). It is clear from this record that Officer Hill was justified in attempting to make an arrest for an offense committed in his presence.

The cases cited by the defendant to the effect that a person being arrested may resist an invalid or illegal arrest have no application here.

Shirley Ann Davis, called as a witness by the People, was, on motion of the State's Attorney, made a court's witness. The People represented that she was testifying contrary to statements previously given to the State's Attorney; that she was a hostile witness and the State was surprised by her testimony. The objections during trial to making Shirley Davis a court's witness were limited to a dispute as to whether or not

the State was surprised by her testimony. The motion for a new trial did not assert any error by the trial court in making Shirley Ann Davis a court's witness. It is, as the People assert, a general rule in this state that matters not set forth in the written motion for a new trial are waived. People v. Walker, 34 Ill. 2d 23, 213 N.E.2d 552 (1966); People v. Irwin, 32 Ill. 2d 441, 207 N.E.2d 76 (1965). The facts and circumstances of making the witness a court's witness in this case are not in any way comparable to the facts and circumstances that attended such action in People v. Bell, 61 Ill. App. 2d 224, 209 N.E.2d 366 (4th Dist. 1965), or People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1953).

The judgment and sentence of the circuit court of Sangamon County are affirmed.

Affirmed.

TRAPP, P.J., and SMITH, J., concur.

103 I.A. 2nd 363

NO. 68-143

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

ROBERT C. RANSOM,

Plaintiff-Appellant,

vs.

DR. WILLIAM G. CUMMINGS, et al.,

Defendants-Appellees.

Appeal from the Circuit Court of the 18th Judicial Circuit, DuPage County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Robert C. Ransom appeals from an Order dismissing with prejudice his Amended Complaint as to the defendant, Dr. William G. Cummings, and his Second Amended Complaint against other defendants. The action was commenced to recover $32,061.93 as attorney's fees for collection of certain assets formerly held in joint tenancy. Ransom also appeals from an order awarding the defendants $3,681.00 for expenses and attorneys' fees under Section 41 of the Civil Practice Act.

Plaintiff urges that each Complaint stated a good cause of action against the Motions to Dismiss, and claims that the sustaining of the Motions to Dismiss and other procedural errors require a reversal.

Ransom, an attorney at law, had for some years prior to the filing of this suit, represented S. Dean Saunders and Viola L. Saunders, his wife, and as their attorney, had prepared a joint and

mutual Will and Codicil, which among other provisions, attempted to dispose of certain joint tenancy property under a testamentary trust. Thereafter, Viola L. Saunders died and S. Dean Saunders was named Executor under the terms of their Will. Plaintiff acted as attorney for the Executor of the Estate which was probated in the Circuit Court of DuPage County.

Shortly thereafter, S. Dean Saunders moved to Florida and Dr. William G. Cummings was appointed Successor Executor. Plaintiff, thereafter, on behalf of the Successor Executor filed a Complaint in DuPage County to construe the joint and mutual Will to determine whether the Will disposed of the joint tenancy properties of the plaintiff.

The Circuit Court of DuPage County in its Decree held that the Will effectively terminated the joint tenancy ownership status of all that property owned by the Saunders' and created an estate of tenancy-in-common in such property. The court further held that the Will failed to dispose of that property and decedent's interest therein passed by intestacy to S. Dean Saunders as the surviving spouse. The court also ordered payment of attorney's fees in connection with the Will construction suit to the plaintiff in the amount of $700.00.

Thereafter, S. Dean Saunders gave to certain relatives of Viola L. Saunders, property which they would have received had the Will effectively disposed of the properties in question. Subsequently plaintiff petitioned the court for attorney's fees rendered in the Estate of Viola L. Saunders and received fees in the amount of $7,500.00 for services rendered in the Estate.

Plaintiff advised Dr. Cummings that he was going to charge a collection fee for obtaining the property which S. Dean Saunders gave to relatives of Viola L. Saunders, and upon Dr. Cummings refusal to pay, plaintiff filed suit in Cook County against Dr. Cummings and the recipients of the gift from Saunders.

The original Bill of Complaint was dismissed on motion.

Ransom filed an Amended Complaint which contained the allegations that plaintiff was the attorney for S. Dean Saunders, the duly appointed Executor of the Estate, and "ex-officio Testamentary Trustee of the joint tenancy properties in the name of VIOLA L. SAUNDERS and S. DEAN SAUNDERS, husband and wife"; that plaintiff was "ex-officio attorney for" all of the contingent beneficiaries of "said Testamentary Trust Estate"; that Dr. Cummings was appointed successor executor and was "ex-officio Successor Testamentary Trustee and custodian of the Trust Estate property created in the Joint Will of VIOLA L. SAUNDERS, and S. DEAN SAUNDERS, husband and wife" and "said trust property was not a part of the Estate property"; that Dr. Cummings "orally retained the Plaintiff as attorney for the purpose of collecting the said joint tenancy property from the said S. DEAN SAUNDERS by litigation or otherwise"; that there was no written agreement as to compensation but "the Plaintiff was of the opinion and belief, at the time he accepted the said employment, he would be paid the customary fee as suggested by the Illinois Bar Association for making collection".

The Amended Complaint further alleged that Dr. Cummings as "agent and representative for" the contingent beneficiaries "in said Testamentary Trust" orally retained Ransom to negotiate with Saunders for the settlement of the jointly held property; that at the time he accepted the said employment "the plaintiff was of the opinion and belief that he should be paid the customary fee as suggested by the Illinois Bar Association for making this collection"; that pursuant to the employment he continued his negotiations with S. Dean Saunders and collected from him money and stock valued at $127,914.41; that said money and stock were delivered to Dr. Cummings "as agent and representative for the defendants herein".

The Amended Complaint came on for hearing in Cook County on defendants' Motion to Dismiss and it was ordered that the Amended Complaint be stricken as to all defendants except Dr. Cummings, individually. Leave was given to file a Second Amended Complaint as to the other defendants and time was given to answer or otherwise plead to both the Amended Complaint and the Second Amended Complaint.

Plaintiff filed a Second Amended Complaint as to all of the defendants except Dr. Cummings. In this complaint plaintiff alleged that Saunders orally appointed Dr. Cummings as trustee of all of the joint tenancy properties for the benefit of Saunders and all of the defendants except Dr. Cummings, and that through the efforts of plaintiff the sum of $127,914.41 was collected from Saunders for the use and benefit of the other defendants and deposited with Cummings as trustee. The Second Amended Complaint then claims that plaintiff thereby became entitled to receive from defendants the sum of $32,061.93 as reasonable and customary attorney's fees for collection services.

The cause was then transferred to the Circuit Court of DuPage County, and on motion of Dr. Cummings, by plaintiff as his attorney, an order was entered reopening the Estate of Viola L. Saunders. It was also ordered that plaintiff's case and the Estate matter be heard at one time.

The defendants named in the Second Amended Complaint filed a motion to dismiss that complaint. This motion was continued for hearing to April 19th, 1968. At that time a motion was made instanter on behalf of the defendant Dr. Cummings to dismiss the Amended Complaint also. After a hearing the court below entered the order appealed from to the effect that both the Amended and Second Amended Complaint be dismissed with prejudice.

Thereafter, the defendants filed a petition for expenses pursuant to Section 41 of the Civil Practice Act, and the additional order was entered allowing the expenses in the amount of $3,681.00.

Plaintiff first argues that the motions to dismiss did not specify with particularity the deficiencies in the complaint to support the allegations that it consisted merely of conclusions, did not state a cause of action, and that the alleged cause of action was based upon facts which have been adjudicated in another case; and that for these reasons the motions did not comply with the requirements of Section 45(1), and Section 45(2) of the Civil Practice Act (Ill. Rev. Stat. 1967, Chap. 110, Sec. 45(1), Sec. 45(2)). Defendants have argued that the Decree which construed the joint and mutual will completely eliminated the possible existence of a "trust". They argue that it is clear both from the pleadings and from the statements made by the plaintiff, who appeared pro se in the court below, that Ransom was premising his cause of action on the existence of a "testamentary trust" which did not, in fact, exist. This position was accepted by the trial court and was the apparent basis for the dismissal.

Defendants also point out that the objection to the form of the motions was not made in the trial court and cannot now be the subject of an objection here. We agree that since the sufficiency of the motions was not attacked in the trial court objections to them cannot be raised here for the first time on appeal. Zanbetiz v. Trans World Airlines, Inc., 72 Ill. App. 2d 192, 198 (1966); McWane Cast Iron Pipe Co. v. Aetna Cas. & Surety Co., 3 Ill. App. 2d 399, 402 (1954); Yellen v. Bloom, 326 Ill. App. 134, 138 (1945).

However, we find that the court below was in error in dismissing the Amended Complaint and the Second Amended Complaint.

The pleadings are not carefully drawn and the exhibits thereto attached (consisting of the joint and mutual will, letters

testamentary, the decree construing the will, and articles of agreement evidencing the settlement between Saunders and the defendants) in some places refer to the trust property as consisting of stock in which Saunders had a beneficial interest by reason of a testamentary trust set out in the joint Will. But it seems clear from reading the pleadings and the exhibits in their entirety that the "trust" referred to was not a testamentary trust but the trust created by the settlement agreement after the death of Saunders' wife. The references to the testamentary trust appear to be an inarticulate method of describing property originally intended to be included in such trust under the Will which were by the later settlement segregated in the hands of Dr. Cummings as an alleged trustee for the various beneficiaries.

Essentially the complaints state that Dr. Cummings on his own behalf and as agent for other beneficiaries hired Ransom to get Saunders to turn over the former joint tenancy property to Dr. Cummings as successor trustee under the Will until the construction suit judgment declared the invalidity of the dispositions, and thereafter to make a gift of a share of that property to the various heirs of Mrs. Saunders. If plaintiff can prove these facts, he may be entitled to attorney's fees in an amount sustained by the proof. Estate of Bort, 75 Ill. App. 2d 322, 327 (1966).

Defendants claim that plaintiff would not be entitled to fees in any event because of a conflict of interests. The basis for this claim is that plaintiff represented both of the Saunders in drafting their joint last will and testament and also represented Dean Saunders, as executor of the Estate of Viola L. Saunders, until he was succeeded as executor by Dr. Cummings, and thereafter continued to represent the estate in connection with the probate thereof. However, the funds allegedly collected for the beneficiaries by the agreement of Saunders to make the gift were not part of the estate and were not collected from the estate, so that we

do not consider that as a basis for the alleged conflict. (Although there might be a conflict during the period alleged prior to the judgment in the will construction suit).

It was the trial court's feeling, which he expressed, that plaintiff should not claim compensation for an error in the drafting of the joint and mutual Will and from which error the whole problem involved in the litigation arose. However, this is not an issue which was raised by the motion to dismiss, nor is the conclusion on this point clear from the pleadings filed in the case.

On trial of the cause any proper defense may be raised by answer and considered in the context of what the plaintiff is entitled to recover, if anything.

Defendants have also argued that the fees are clearly excessive, and this also is a matter which may be determined on a trial.

In the view we have taken of the case, it was also error to order the payments of attorneys fees and expenses under Section 41 of the Civil Practice Act.

We have taken a motion of defendant to dismiss the appeal as to the Amended Complaint against Dr. Cummings with the case. The body of the petition for a rehearing pertained to both the Amended and the Second Amended Complaint although the entitlement of the petition did not. We consider that the appeal was timely filed after the denial of the petition for a rehearing as to both complaints and, therefore, deny the motion.

We, therefore, reverse the judgments below and vacate the trial court's Orders which dismissed the Amended Complaint and the Second Amended Complaint with prejudice, and directed payment to the defendants of attorneys' fees and expenses. The cause is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Moran, P.J. and Abrahamson, J. - Concur

108 I.A. 2nd 438

NO. 68-146

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

GEORGE FRANKS,

Defendant-Appellant.

Appeal from the Circuit Court of DuPage County, 18th Judicial Circuit.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Defendant appeals from a court finding and judgment of guilty, with fines imposed, on charges of Assault and Resisting or Obstructing a Peace Officer.

He contends that he was not proven guilty beyond a reasonable doubt of either offense. Particularly as to the Assault case, he argues that the State failed to prove that defendant acted without lawful authority; failed to prove that defendant's actions placed another in reasonable apprehension of receiving a battery; and that the proofs offered tended to show a battery, not an assault. Error is also claimed in the denial of defendant's motion to suppress certain evidence.

Tony Millazzo, a Game Warden for the State of Illinois, testified that he received two anonymous phone calls relative to possible game code violations. In response to these calls he drove to the unincorporated area near Downers Grove in the area near defendant's home. There was a pond in the vicinity.

Upon arriving at the scene, he heard a shotgun discharge. The sound came from the area of defendant's home, and he proceeded there, where he observed four persons, including the defendant, standing near defendant's house. He parked his official car, the sides of which were marked "State of Illinois Conservation Department", in front of the decedent's house. He was dressed in civilian clothes.

The warden got out of his car, walked up to the four men standing outside of the house and identified himself as a game warden, with a badge in his hand. He asked them what they were doing "shooting ducks at this hour". There was further conversation and he noticed the shotgun laying on the sidewalk. He bent down to pick up the gun and at that time heard a voice say that the gun was not loaded. At this time, he ejected a shell from the gun. The defendant then grabbed the shotgun, and after a struggle defendant wrestled the gun from him. At the time the witness had the gun, he noted that it had not been recently fired. Defendant handed the gun to his brother who took it into the house.

Millazzo testified that his reaction at that time was nothing more than to get back to the car and call for assistance. He retreated to the car and radioed for assistance and shortly thereafter two deputies, John Ory and Warren Judge, of the DuPage County Sheriff's force arrived at the scene.

Deputy Ory testified that after he received the call for assistance he had a conversation with the game warden; that he then walked up to the house, knocked on the door; that a woman whom he believed to be the defendant's wife came to the door, and he asked to see the person who was shooting the shotgun. He could see the defendant sitting inside the house in the living room. He asked the game warden if he wanted to arrest defendant and he stated he did. Ory advised the defendant that he was under arrest.

The defendant told him that he couldn't take him out of the house without a warrant.

The deputy went to the squad car to get his night stick and handcuffs, went back to the house, walked in, went up to the defendant, placed him in handcuffs and walked him outside.

As the witness was attempting to get the defendant into the squad car, the defendant was trying "to get away, wiggle away, and trying to prevent me from getting him into the squad car". After he got defendant into the squad car, the deputy testified that he was not able to shut the door because defendant's wife was standing there talking to defendant. He asked her to move several times and she refused, and he grabbed her arm and started to pull her out of the way. The defendant became upset and jumped out of the car and accused the deputy of pushing his wife around, and he shot the defendant with mace; and in the process defendant's wife and the deputy also received some of the chemical.

Deputy Judge testified that before the handcuffs were put on defendant, no action was taken by the defendant, but that he said he couldn't be taken out of his own home without a warrant. He testified that defendant "tried to resist a little bit" when he was being taken to the police car, but that the resistance was verbal, and the only action taken by defendant was that he tried to "move away" from the officers. He testified to the defendant coming out of the car when Deputy Ory physically tried to move Mrs. Franks away, and to the incident with the mace.

For the defendant, Mrs. Franks testified that she and her husband were in the house when the warden picked up the gun; that defendant went out and took the gun away from the warden and gave it to his brother who brought it in the house. She testified that there was no tussle, that the warden was holding the gun and the defendant just took it from him.

She further testified that after they were in the house and about 15 or 20 minutes later she heard someone say, "That's the one I want. That's the guy". The warden and the deputies pulled open the door, pushed her aside and told defendant he was under arrest. She testified to conversations complaining of an arrest without a warrant, but stated that there was no "scuffle" to the time that defendant was in the squad car; that the only movement defendant made was when the police officer grabbed her and then he tried to get between them.

Defendant's brother testified that he had shot the shotgun a couple of times at a plastic bowl or bucket, but that he did not shoot at any pond nor did he see any wild ducks that day; that the warden did not show any identification prior to taking the gun; that the defendant told the warden that he was trespassing and took the gun away from him, but that there was no struggle; and that about 15 or 20 minutes later the warden came back with the police officers. He essentially corroborated the testimony of Mrs. Franks, as did another witness for the defendant, Bob Brown, who was present.

Defendant testified essentially to the same effect. He testified that he had verbally remonstrated with the officers that they could not arrest him in his home without a warrant, but that he made no struggle of any kind. He further testified that when he was in the squad car and the incident occurred where the deputy tried to move his wife, that he merely stuck his head out and tried to get between them when he was sprayed with mace; and that his hands were then handcuffed and in back of him.

The complaint charging the assault under Ill. Rev. Stat. 1967, Chap. 38, Sec. 12-1[1] particularized the conduct: "said defendant did wrestle a shotgun out of the hands of said complainant. Said complainant at the time was in the performance of his official duties as Illinois State Game Warden and thereby placed said complainant in reasonable apprehension of bodily harm".

The complaint of resisting or obstructing a peace officer in violation of Ill. Rev. Stat. 1967, Chap. 38, Sec. 31-1[2] essentially alleged the proscribed conduct as the attempt by defendant to push and break away from Deputy Ory after defendant was placed under arrest.

THE ASSAULT CHARGE

Defendant first contends that the State failed to prove that he acted "without lawful authority" in taking the shotgun back from the game warden as required under Chap. 38, Sec. 12-1 (supra). The direction of this argument is that the game warden had no legal right or justification to take possession of the shotgun inasmuch as, admittedly, there was no violation of any statute or ordinance, and only the force necessary to regain possession of the property seized was used by the defendant. (Ill. Rev. Stat. 1967, Chap. 38, Sec. 7-3)

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(1) "Sec. 12-1. Assault. (a) A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.
(b) Penalty.
A person convicted of assault shall be fined not to exceed $500."

(2) "Sec. 31-1. Resisting or Obstructing a Peace Officer. A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both."

The State claims authority in the game warden to go upon the defendant's property under the provisions of Sec. 11 of the Game Code (Ill. Rev. Stat. 1967, Chap. 61, Sec. 143), which provides that "Officers and employees of the Department are empowered, without a warrant, to enter all lands and waters and examine all buildings, private or public clubs (except dwellings) x x x". The State points out that the evidence shows that the warden saw where the shot emanated from and that he had previously been advised by a telephone call of an alleged Game Code violation, so that he was lawfully on the "lands" of the defendant.

Defendant urges that the exception of "dwellings" includes the outside area of defendant's property where the events in question took place. In this connection and in connection with his argument that there was an unreasonable search and seizure of the gun, the defendant cites authorities to the effect that the protection against unreasonable searches and seizures extends to a person's place of dwelling and to the curtilage of the dwelling. While we are unable to find the language which defendant quotes in either of the authorities cited, (The People v. Stokes, 334 Ill. 200 (1929), or The People v. Lind, 370 Ill. 131 (1938)), we do not quarrel with the position that the protection against an unreasonable search and seizure extends beyond a person's place of dwelling and would include other parts of the defendant's premises if the officer had no right to be there. However, the provision of the Game Code referred to above does give the authority to the warden to go upon "lands". The officer was therefore on the defendant's land by lawful authority in our opinion, and defendant would have been acting "without lawful authority" if an assault were proven.

Defendant contends, however, that no assault was committed since his acts did not place the game warden in reasonable apprehension of bodily harm. Defendant argues that he turned and went back into the house and that the game warden did nothing more than to go to his car and call for assistance.

The State points to the facts in the record -- that the warden was told first that the gun was empty and found that it was loaded; that it was wrestled away; that there were four people antagonistic to him; and that he didn't get out of his car until the deputies came - as an objective showing of a sufficient apprehensive mental state to satisfy the statute. We believe that this was properly a matter for the magistrate who heard and saw the witnesses and that his finding is not against the manifest weight of the evidence.

Defendant further argues that, in any event, Assault and Battery are two separate and distinct offenses and that it was improper to charge the defendant with an assault when there was actually a battery. However, the offense of Battery requires proof of bodily harm, or physical contact of an insulting or provoking nature (Ill. Rev. Stat. 1967, Chap. 38, Sec. 12-3), and we can find no error in the State charging an offense under the Assault section under the circumstances of this case.

THE CHARGE OF RESISTING OR OBSTRUCTING A PEACE OFFICER

Defendant recognizes that one is not authorized to use force to resist arrest even if he believe the arrest to be unlawful, or if, in fact, that arrest is unlawful. Ill. Rev. Stat. 1967, Chap. 38, Sec. 7-7(a).

Defendant also concedes that the amount of resistance which must be proved is a matter of degree. However, he argues that

any resistance here is so minimal that it should not be a basis for a conviction. He points to the fact that no reason was given for the arrest; that office Ory said he didn't know why the arrest was being made; that the defendant was not happy with being arrested under the circumstances, but only verbally protested on the way to the car; and that his actions at the squad car were not to resist arrest but to protect his wife.

While the direct evidence of the resistance by the defendant is not strong, there is evidence that the defendant, on the way to the car, tried to "move away" from the officer, and evidence that he attempted to interfere with the officer when the latter was attempting to move defendant's wife away in order to take defendant to the station. Under the circumstances, we do not feel justified in interfering with the finding of the court below. We believe, in addition, that the magistrate could properly draw the inference that the antagonism of the defendant was substantial enough to indicate to the officer that he needed to get his night stick and handcuffs in order to complete the arrest, and to justify a proper inference from the circumstances that defendant was resisting arrest to the extent that it was apparent that he would not go with the officer willingly without the action which the officer took.

We distinguish People v. Rinehart, 81 Ill. App. 2d 125 (1967), cited by the defendant. In that case the officer did not advise the defendant that he was under arrest and there was no evidence of physical resistance of any kind.

Finally, we find no reversible error in the denial of the motion to suppress evidence. The theory of the defendant was that the warden had no legal right to be upon the defendant's premises, that the warden did not have any authority or reasonable cause to seize the property since it was not unlawful to have a gun on one's

property or to fire a gun in an unincorporated area, and since the original seizure of the gun was unlawful all subsequent transactions that took place in relation to the gun must also be suppressed. Under our view of the case, the warden was lawfully upon the premises and, in fact, there was no search because the gun was open to view. See The People v. Marvin, 358 Ill. 426, 428 (1934).

Defendant has also cited People v. Young, 100 Ill. App. 2d 20 (1968). However, in that case there was an attempt to serve a search warrant on the wrong person, though with a common last name. The State sought to have the execution of an illegal search warrant considered in the same category as the making of an illegal arrest. However, the court pointed out that in the latter instance forcible resistance is prohibited by law, and referred to the public interest in discouraging violence and insisting upon the use of peaceful methods of obtaining a release from an unlawful arrest as clearly outweighing the recognition of the feeling of the individual. The authority does not support the defendant's position.

We, therefore, affirm the judgments below.

Affirmed.

ABRAHAMSON, J. and DAVIS, J. concur.

NO. 68-178

103 I.A. 2nd 443

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant	)	
v.	)	Appeal from the Circuit Court of the 18th Judicial Circuit,
FRANK LIO,	)	DuPage County, Illinois
Defendant-Appellee	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On July 3, 1968, the defendant, Frank J. Lio, was arrested in the Village of Roselle, DuPage County, and charged with the violation of Section 49 of the Illinois Uniform Act Regulating Traffic and two ordinances of the Village. The first charge was in the form of an Illinois Uniform Traffic Ticket and Complaint and alleged that on that date Lio was driving 13 miles per hour in excess of the posted speed limit on Roselle Road in the Village. The other charges alleged that he committed the offenses of "DISORDERLY CONDUCT" and "OBEDIENCE TO POLICE OFFICER" in violation of the Village ordinances on the same date. All three charges were returnable before a field court in Roselle on July 23, 1968.

The meager record before us indicates that an attorney filed an appearance on behalf of Lio in the speeding case, that a plea of guilty was entered, that Lio was found guilty and fined $13 and $5 costs. The other cases were dismissed by the magistrate presiding in the field court on the motions of the Village prosecutor to nolle pros.

Lio was again arrested, on July 23, and charged with the violation of Sections 26-1 (Disorderly Conduct) and Section 31-1 (Resisting a Police Officer) of Chapter 38 of the Illinois Revised Statutes. (Ill. Rev. Stats. Ch. 38 secs 26-1 and 31-1). The new complaints alleged acts by the defendant similar to those contained in the complaints that had been dismissed.

The defendant appeared with new counsel on the day set for trial of the second charges. After the first witness had been sworn, the defendant moved that both charges be dismissed on the basis that they were multiple prosections for the same act and, hence, barred by Section 3-3 of the Criminal Code (Ill. Rev. Stats. Ch. 38 Sec. 3-3) and also a violation of his constitutional protections against double jeopardy. The trial court agreed, discharged the defendant, and the State brings this appeal.

[1.] We are unable to determine from the record if the defendant had previously been placed in jeopardy on these charges or if they were multiple prosecutions for the same act. It is not necessary, however, to go into the merits of this case since the defendant has failed to file either his appearance or brief in this Court.

It has been repeatedly held that the reviewing court is authorized to reverse and remand a cause without consideration of the merits of the case where the appellant has complied with the statutory requirements and rules of court and the appellee has failed to either appear or file a brief. Latronica v. Latronica, 97 Ill. App. 2d 332; Beinarauskas v. Beinarauskas, 90 Ill. App. 2d 381; Parkside Realty Co. v. License Appeal Comm., 87 Ill. App. 2d 374.

REVERSED AND REMANDED.

MORAN, P. J. and DAVIS, J. concur.